Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Winstar Communications, LLC	)	
Emergency Petition for Declaratory Ruling	)	
Regarding ILEC Obligations to	)	
Continue Providing Servides	)	
	)	**WC Docket No. 02-80**
And	)	
	)	
Verizon Communications, Inc. Counter-	)	
Petition of Verizon for Declaratory Ruling	)	

COMMENTS OF CAVALIER TELEPHONE, LLC

In response to the Commission's May 3, 2002 public notice, Cavalier Telephone, LLC ("Cavalier") submits these brief comments concerning Verizon Communications, Inc.'s ("Verizon's") Counter-Petition for Declaratory Ruling. The questions raised by Verizon are clearly designed to divert the Commission from the central issue raised by Winstar's initial petition, whether Verizon's actions are in violation of the Communications Act. Instead, Verizon seeks to use the Commission's process to obtain ammunition for use against Winstar, Cavalier and others in Verizon's on-going efforts in bankruptcy court.

I. 365 Rulings of the Bankruptcy Court Cannot Be Avoided By Verizon's Counter-Petition.

The question of whether or not an assumption and assignment has occurred under Section 365 of the Bankruptcy Code is a matter for the Bankruptcy Court to determine. The duties and obligations of Verizon, as the incumbent monopoly provider of essential telecommunications services, is a matter for review by this Commission under the

Communications Act. Just as there is no Communications Act exception to Section 365 of the Bankruptcy Code, Verizon is mistaken in suggesting that the Communications Act is irrelevant to the scrutiny of Verizon's carefully designed efforts to manipulate its dominant position as the last mile provider of essential telecommunications services to a purchaser of customers in a bankruptcy proceeding.

Cavalier cannot help but interpret Verizon's Counter-Petition in the context of its repeated inability to convince the bankruptcy court that, as regards Cavalier, there never has been any such "assumption and assignment" of Verizon's preexisting contracts or service arrangements with Net2000. When the sale of Net2000's assets to Cavalier was presented to the Bankruptcy Judge, Verizon argued that an assignment occurred. Verizon lost. Having lost its argument that there was an assumption and assignment of its contracts with Net2000 through the sale process, Verizon then filed an Emergency Motion with the Bankruptcy Court to, yet again, litigate the issue of assumption and assignment. The Bankruptcy Court conducted an extensive evidentiary hearing concerning Verizon's second effort to prove an assumption and assignment. Verizon lost, again.

Coupled with these efforts, and in the face of defeat, Verizon embarked on a campaign, which continues today as evidenced in its May 3, 2002 reply comments in this proceeding, to discredit Cavalier in the hopes of intimidating Cavalier to pay debts that Verizon was not able to recover from Net2000.[1] Verizon, through its Counter-Petition, now seeks to obtain a ruling it could not obtain out of the Bankruptcy Court. The

[1] The Commission should question whether Verizon has created, or contributed, to the situation it finds itself in, given the well documented billing errors and other discrepancies caused by Verizon's trouble prone wholesale billing systems. It is likely that Verizon resisted efforts to seek recovery of debts of

Commission should properly dismiss this effort and declare that only a bankruptcy judge can pass on the "rights" afforded by section 365 of the Bankruptcy Code, not this regulatory commission. The Commission should also admonish Verizon's efforts to defame Cavalier in the context of this proceeding. Evidently, Verizon cannot avoid taking to the low road in retribution for its losses in bankruptcy court and as a device to distract the Commission from Verizon's own illegal conduct. Verizon's *ad hominum* attacks on Cavalier and its officers and employees does little to advance the debate in this proceeding; rather, such attacks only serve to underscore the bitterness that motivates Verizon's efforts to drive out competitors from its markets.

II. The Commission should refrain from carving out, in the abstract, a general rule on what constitutes an assignment or transfer under Verizon's tariffs and defer such considerations to specific cases and controversies.

Verizon has insisted that Cavalier and its officers and employees endure hours of depositions and days of trial before a fact-finding judge in order to determine if the facts in the Net2000 acquisition amount to a de facto assumption and assignment (and obligation to cure). A trial of this question took place, over three days, and a trial judge made specific findings. While Verizon lost that trial, for the purpose of this Counter-Petition, Cavalier knows from first-hand experience that the question of whether "an assignment or transfer" has occurred, whether for Section 365 purposes or under Verizon's tariff, is a matter that must be decided upon review of all the facts of a transaction and cannot so easily be parsed into an abstract declaration request of this Commission. The futility of such an effort is even more pronounced when, as is the case with Cavalier, there is vast disagreement with Verizon's posturing of whether a party

---

special access services for fear of disrupting on-going Section 271 proceedings, where the accuracy of

"wishes" to take on another carriers services arrangements in the manner assumed by Verizon.

The Commission will no doubt, once again, soon receive Verizon's response that an assignment has occurred in the Cavalier/Net2000 transaction. Verizon will surely, yet again, attempt to twist and weave its version of facts to fit a theory discredited by the bankruptcy judge, as shown in Verizon's May 3, 2002 Reply Comments.[2] Anticipating these comments, Cavalier is compelled to point out that its position has remained constant: Cavalier stands on its own independent rights, through its own interconnection agreements and through its own facilities-based network, to obtain UNE loops from Verizon so as to service Net2000's former customers. Moreover, upon closer examination, the Commission will appreciate that the utility of suggesting that a name change of service providers is all that is needed to affect an assignment is futile, in the absence of a careful review of the surrounding facts underlying the transaction.

Cavalier has maintained since the very first meeting with Verizon, well before the actual sale of the assets, that Verizon has a duty to switch and port over the former Net2000 customers over to Cavalier's network. Cavalier never intended to merely just "change the name" on the bills, only to then take on the failed arrangements that doomed Net2000 to bankruptcy. Cavalier, like Winstar Communications, LLC ("Winstar") has maintained all along that Verizon has an obligation under the Communications Act to deal in good faith in the transition and migration of Net2000's customers over to Cavalier's UNE based network. Verizon is obligated further by the Communications Act to assist in arranging for a seamless transition of these customers.

Verizon's wholesale bills was under examination.

[2] Verizon Reply Comments at 9-15.

Verizon is wrong to assert that Cavalier is "gaming" the regulatory rules. Cavalier only seeks what the Communications Act and the interconnection agreements with Verizon require. The only "gaming" at play is Verizon's leveraging of its monopoly stranglehold over last mile customer loops to the disadvantage of competitors and those carriers still able to seek to expand their presence through acquisitions in bankruptcy. Thus, what Verizon is really seeking in its Counter-Petition is the blessing of this Commission for the strong-arm tactics used against Cavalier, thus far unsuccessfully, to squeeze Cavalier to pay off the debts of Net2000. Verizon simply cannot accept that the facts do not show that there was any such assignment.[3]

One key fact that is omitted entirely from Verizon's diatribe against Cavalier in its Response and Counter-Claim is the fact the Cavalier is not, and never has been, a special access based carrier in the Net2000 model. Cavalier owns its own switches and relies to the greatest extent possible upon its own fiber optic wires that are connected to Verizon's collocation offices. Cavalier is not in the business of reselling Verizon's end-to-end services and has never sought to lease Verizon's special access services in long term tariffs as Net2000 did.[4] In short, Cavalier is not interested in a mere "name change" only, and Verizon knows this as a result of first-hand meetings. Cavalier is

---

[3] The error of Verizon's position is reflected by the fact that they are not directly seeking a declaratory ruling from this Commission specifically concerning Cavalier's acquisition of Net2000's assets out of a bankruptcy proceeding. There is little wonder in that since Verizon would be collaterally estopped from suggesting that the facts in the Cavalier/Net 2000 transaction remotely prove an assignment and assumption. Failing this, Verizon is seeking to obtain indirectly a more general ruling , based on a mischaracterization of the facts, to then use as a wedge in its on-going litigation in bankruptcy court and elsewhere against Cavalier.

[4] Cavalier does lease one small portion of network functionality from Verizon, the local loop. However, it does so at wholesale rates set by State Commissions and incorporated into Cavalier's various Interconnection Agreements with Verizon.

interested in migrating and cutting over the former Net2000 customers to Cavalier's facilities-based network, and Verizon knows this as well.[5]

One other key fact omitted from Verizon's Response and Counter-Claim is the fact that Cavalier sought to do everything that Verizon now suggests, in order to affect a seamless transition of customers. For example, in Verizon's Response, the point is made that

> there is little risk of service disruption if the CLECs plan ahead, coordinate closely with each other, and coordinate with Verizon. When the new carrier places service orders well in advance, Verizon can in almost all circumstances cut the customer over to the purchaser in a manner that does not result in a significant disruption to the customer's service.[6]

Yet, following the execution of the Net2000 Asset Purchase Agreement, and on November 27, 2001, Cavalier did exactly that when it met with Verizon and representatives of the Virginia State Corporations Commission for advance planning and coordination that, in Verizon's own statement, should have avoided any of the Verizon instituted disruptions used as a strong-arm tactic to illegally squeeze extra special access revenues from Cavalier.

At this November 2001 meeting, Cavalier produced diagrams showing the differences of the networks of Cavalier and Net2000 and the importance of migrating the customers over to Cavalier's fiber optic UNE based network. The whole point of these advance meetings with Verizon and staff of the Virginia Commission was to aid in a seamless and efficient transfer of service providers with the orderly and timely

---

[5] As pointed out in Cavalier's Reply Comments, Verizon is finally processing Cavalier's orders to cut-over and migrate these circuits to Cavalier's network based on the terms of the interconnection agreements. Notably, Verizon is using the same facilities, and the same information provided to Verizon in December 2000 with which to affect this change in service provider from Net2000 to Cavalier.

[6] Verizon Response and Counter-Claim at 18.

discontinuance of the special access services Verizon was providing to Net2000. Cavalier did everything Verizon asked to aid in this transition, including providing its new orders by way of a "spreadsheet," as opposed to individual LSRs, so as to facilitate for Verizon the processing of large numbers of access lines without disruption.

Then, out-of-the blue, on December 28, 2001, Verizon's attorneys ordered a halt to any processing of Cavalier orders, effecting a blockade and embargo of just the sort of pre-arranged planning that Verizon now submits is critical. Of course, this illegal action was undertaken to outright pressure Cavalier into taking on the debts of Net2000 and to buttress Verizon's litigation strategy in bankruptcy court. This illegal blockade, which has harmed Cavalier enormously, lasted until March 2002 when Verizon began processing the cut-over using the very same orders, over the very same facilities, per the bulk order spreadsheets instead of individual LSRs, at Verizon's request.

Moreover, Verizon's erroneous reference that "Cavalier and Net2000 suggested that the Verizon service arrangements would be transferred to Cavalier and a cure would be paid" is pure fancy as well as totally contrary to the facts, as ruled by the bankruptcy judge.[7] As Verizon has known since at least the meeting of November 27, 2001, Cavalier's intent all along was to arrange for the transfer of Net2000 customers to be served out of Cavalier's independent contract rights, secured under the Telecommunications Act, and not by way of Net2000's long-term special access tariff arrangements.

---

[7] This quote is lifted out of Verizon's May 3, 2002 Reply comments where, at pg 9, Verizon seeks to attribute such a "suggestion" to Cavalier with a footnote reference to Verizon's Reply and Counter-Petition at pg. 5. A review of page 5 of the Reply and Counter-Petition reveals a discussion of proceedings involving the IDT/Winstar transaction, not the Cavalier/Net2000 proceeding. This only proves that Verizon's unsubstantiated and manipulation of facts should not be used as the basis for such a sweeping declaration of the type sought by Verizon in its second request in the Counter-Petition.

What Verizon also leaves out in its recitation of the facts of the Net2000 transaction is that Verizon's embargo and blockade forced Cavalier to request that Verizon continue to provide the services to these customers, and, since Verizon refused for several months to process the change orders to Cavalier's network, the only way this could be done was through the existing special access circuits. The point being that Cavalier did not request this arrangement, but was forced into this by Verizon's outright refusal to deal. Having successfully blocked Cavalier's ability to process its orders, Verizon now suggests that since services were maintained, Cavalier has *de facto* agreed to an assignment and cure of all past debts. This manipulation and gaming of its dominant control over last mile facilities could not be more obvious, and the abuse of its monopoly position in this manner should be equally evident to the Commission.

In short, Verizon's attorneys made sure that Cavalier would have no way to process service orders over to Cavalier's network, as required under the parties interconnection agreements, and as mandated under the Communications Act. Once blocked, Verizon now claims that Cavalier's only way to maintain services while it protests this abusive treatment (through the existing special access circuits) are "nothing more than a name change" mandating that "and assignment or transfer" has occurred "within the meaning of Verizon's tariffs, so that the assignee/transferee CLEC must assume the outstanding indebtedness of the prior CLEC for such services."[8] The Commission is urged not to cater to such a blatant effort to manipulate the facts into a rule that could be used by Verizon against potential purchasers of assets in bankruptcy.

---

[8] Verizon Counter-Petition at 26.

As this brief comment reveals, the issue of assignment and transfer under Verizon's tariffs cannot be so easily determined without close examination of all the facts surrounding the transaction. Nowhere is this more so than where there is a disagreement over the basic underlying facts, as is the case in the Cavalier/Net2000/Verizon context. The Commission should avoid Verizon's efforts to evade the truth of a particular transaction by declaring a blanket "assignment" rule based on Verizon's self-serving factual presentations.

III. The Commission Should Clarify the Obligations of Carriers And The Responsibilities of Carriers to Customers In the Context of a Transfer of Customers in Bankruptcy.

As pointed out in Winstar's Reply Comments of May 3, 2002, the Commission has insisted that the change of service providers must be accomplished by Verizon and other ILECs so that customers "experience a seamless transition of services from their original carrier to the acquiring carrier."[9] In Cavalier's case, Verizon has done all things in its power to create as much customer confusion and disruption as possible, all in support of relentless (and Cavalier would submit, abusive) litigation designed to force Cavalier to pay debts that Verizon cannot collect from Net2000. There can only be one motive driving Verizon's campaign: This is designed to tighten the noose around a competitor and to impose higher and higher costs on a rival. The Commission should take this opportunity to declare that the Communications Act is no refuge for such conduct.[10]

---

[9] Winstar Reply of May 3, 2002 at 11, ft. n. 22 (quoting the Commission's 2000 Biennial Review, CC Docket Nos. 00-257 and 94-129, 16 FCC Rcd 11218, para. 10 (2001)).

[10] Verizon seeks to discredit Cavalier by reference to correspondence sent to various regulatory commission in January 2002. See Verizon's May 3, 2002 reply. In this case Verizon protests too much, given that Martin W. Clift, Jr., Cavalier's Vice President for Regulatory Affairs and the author of these letters, is not a bankruptcy specialist, but a regulatory expert. As such, what Verizon cannot avoid is the

Therefore, in response to the third question raised by Verizon's Counter-Petition, if the Commission determines that customers require additional forms of notice of possible discontinuance or transfer than is provided for under current procedures, the Commission should at the same time clarify that any such notices remind the customer that the Communications Act makes it incumbent on Verizon to ensure that there is a seamless transition of service from one provider to an acquiring CLEC.

Respectfully Submitted,

_____

Alan M. Shoer
Assistant General Counsel
Cavalier Telephone, LLC
2134 West Laburnum Ave.
Richmond, VA 23227-4342
Tel. 804-422-4518
Fax: 804-422-4599
Email: ashoer@cavtel.com

Counsel for Cavalier Telephone, LLC

May 13, 2002

---

ultimate truth (and defense) of what Mr. Clift was trying to say in these letters; namely that Verizon is obligated under the Communications Act (the essence of Winstar's Petition and Verizon's Counter-Petition) to do all things in its power to coordinated a seamless transition of customers to the authorized new service provider. Verizon seeks to avoid this truth in twisting Winstar's petition into an opportunity to further defame Cavalier. Verizon fails to inform the Commission that Cavalier immediately issued corrective statements to all regulatory officials, once the matter was brought to Cavalier's attention.